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United States District Court, S.D. New York.

CHRYSLER CAPITAL CORPORATION, Plaintiff,
v.
BANKERS TRUST COMPANY, Defendant.

No. 91 Civ. 5090 (RLC).
|
March 17, 1992.

MEMORANDUM AND ORDER

MICHAEL H. DOLINGER, United States Magistrate Judge:

***1** By letter application, plaintiff Chrysler Capital Corporation seeks an order compelling various representatives of defendant Bankers Trust Company to testify concerning certain advice given by the Bank's counsel, John M. Reiss, Esq. (*See* letter from Howard S. Veisz, Esq. to the Hon. Robert L. Carter, dated March 4, 1992.) The advice concerned the interpretation of provisions of a Loan Participation Agreement that is the subject of the current lawsuit. Plaintiff's application is denied.

Plaintiff concedes that the communication in question would ordinarily be protected by the attorney-client privilege,[1] but it argues that this privilege was waived by defendant's production of a memorandum authored by an employee of Bankers Trust in which the substance of the attorney's opinion is disclosed. (*See id.* at 1–2.) Plaintiff also argues that it would be unfair not to compel further disclosure about counsel's discussion with his client because "this communication goes to a critical issue in this case" and because defendant is assertedly using the privilege "as both 'a sword and a shield' " by selectively disclosing only that portion of the communication that supports its position "while seeking to protect the remaining aspects of the communication." (*Id.* at 4–6.)

In opposing this application, Bankers Trust represents that the disclosure of the memorandum—or at least of the segment that refers to the advice of counsel—was inadvertent, and it disclaims any intention to rely on that segment in pressing its case. (*See* letter from **Alice K. Jump**, Esq. to the Hon. Robert L. Carter dated March 9, 1992, at 4, 8.) On that basis, it argues that the disclosure should be deemed inadvertent and hence not tantamount to a waiver of the attorney-client privilege. (*Id.* at 4.)

This case involves state law claims that arise under the diversity jurisdiction of the court. Accordingly, the relevant body of law governing the privilege issues is that of New York State, which is both the forum state and the apparent location of the attorney-client relationship that is at stake in the present controversy. *See* Fed.R.Evid. 501.

The so-called "inadvertent disclosure" question has received little attention by the New York courts, but the one recent reported decision to analyze the question in detail suggests general adherence to the developing case law in the federal courts. *See Manufacturers & Traders Trust Co. v. Servotronics, Inc.,* 132 A.D.2d 392, 398–401, 522 N.Y.S.2d 999, 1003–05 (4th Dep't 1987) (citing cases). *See also McGlynn v. Grinberg,* 172 A.D.2d 960, 568 N.Y.S.2d 481, 482–83 (3d Dep't 1991) (following *Manufacturers*). Accordingly, I rely upon that body of law as well.

Although the courts are not unanimous in their formulation of the governing standards for addressing claims of "inadvertent disclosure," *compare, e.g., FDIC v. Singh,* No. 91–0057, 1992 WL 5501, *1–2 (D.Me. June 10, 1992), *with Hartford Fire Ins. Co. v. Garvey,* 109 F.R.D. 323, 328–32 (N.D.Cal.1985), *and with Mendenhall v. Barber–Greene Co.,* 531 F.Supp. 951, 954–55 (N.D.Ill.1982), it is generally accepted that the unintended and erroneous disclosure of a document containing a privileged communication does not constitute a waiver of the privilege if the attorney and client have taken "reasonable precautions to ensure confidentiality." *In re Grand Jury Proceedings Involving Berkley & Co.,* 466 F.Supp. 863, 869 (D.Minn.1979), *aff'd as qualified,* 629 F.3d 548 (8th Cir.1980) (case involving theft of the privileged material). *See, e.g., Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.,* 111 F.R.D. 76, 85–86 (S.D.N.Y.1986); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.,* 104 F.R.D. 103, 105–06 (S.D.N.Y.1985) (citing cases); *Dunn Chemical Co. v. Sybron Corp.,* 1975–2 Trade Cases (CCH) ¶ 60,561, at 67,463 (S.D.N.Y.1975). *Cf. Hartford Fire Ins. Co. v. Garvey,* 109 F.R.D. at 331 (no privilege when there was a "complete failure to take reasonable precautions").

***2** There is no real dispute that the disclosure by Bankers Trust was inadvertent. The bank produced six boxes of documents, of which the memorandum in question was only one, and the memorandum itself is an eight-page document in small print, with the reference to the advice of counsel appearing in the middle of a lengthy paragraph on the seventh page. Moreover, defendant has not sought to invoke any advice-of-counsel defense, which might suggest that the disclosure was deliberate. Accordingly, the controlling question on waiver is whether the procedures utilized by Bankers Trust were " 'so lax, careless, inadequate, or indifferent to consequences' as to constitute a waiver." *Data Systems of New Jersey v. Philips Business Systems, Inc.,* 78 Civ. 6015 (CSH), Memorandum Opinion and Order at *15 (S.D.N.Y. Jan. 8, 1981) (available on LEXIS) (quoting *National Helium Corp. v. United States,* No. 158–75, slip op. at 3–4 (U.S.Ct.Cl. Feb. 2, 1979).) I conclude that they were not.

Defendant represents, without meaningful contradiction, that it produced "thousands" of pages of documents, and that all were reviewed for privilege by two attorneys and a paralegal. (Jump Letter at 4–5.) Moreover, the otherwise privileged passage consists of only two sentences in the course of an eight-page document, and there is no suggestion that defendant produced any other documents with privileged matter unexcised. Furthermore, once the disclosure was brought to defendant's attention by plaintiff's effort to question deposition witnesses about the substance of the communications with counsel, defendant promptly and consistently invoked the privilege to block further disclosure.

This set of circumstances plainly does not reflect so egregious a pattern of nonfeasance as to suggest an intent or willingness to waive the protections of the attorney-client privilege, which is the central concern in analyzing a claim of inadvertent disclosure. *See, e.g., McGlynn v. Grinberg,* 172 A.D.2d at ——, 568 N.Y.S.2d at 482–83; *Manufacturers & Traders Trust Co. v. Servotronics,* 132 A.D.2d at 399–400, 522 N.Y.S.2d at 1004–1005. *Accord, Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co.,* 104 F.R.D. at 105–06 (citing cases); *Strategem Dev. Corp. v. Heron Int'l N.V.,* 1991 WL 274328, *2 (S.D.N.Y. Dec. 6, 1991); *Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.,* 111 F.R.D. at 85. *Compare, e.g., Dunn Chemical Co. v. Sybron Corp.,* 1975–2 Trade Cases at 67, 462–63 (upholding privilege even though former corporate employee in that case had offered to return his files, in which the privileged document was included, to the client and the client had failed to accept his proffer), *with Eigenheim Bank v. Halpern,* 598 F.Supp. 988, 991–92 (S.D.N.Y.1984) (privilege waived when company twice produced privileged document as part of small volume of documents delivered to its adversary, the second time after having belatedly invoked a claim of privilege).

***3** The balance of plaintiff's argument is plainly misconceived since it rests on the assumption that the disclosure was deliberate. Defendant is not seeking to make use in this lawsuit of counsel's advice to the client concerning the legal effect of the language embodied in the contract. Hence it cannot be said that defendant is attempting to make use of any portion of the privileged communication. Necessarily, then, no waiver may be inferred on the basis of the legal principles invoked by plaintiff. (*See* Veisz letter at 5–6.)

CONCLUSION

For the reasons stated, plaintiff's application is denied.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1992 WL 58854

Footnotes

1 Plaintiff thus foregoes the argument that the attorney in question was not offering legal advice but rather providing his interpretation of the agreement based on his role as negotiator of the Participation Agreement, in which case the conversations might not have been privileged in the first place. *See, e.g., E. v. E.,* 76 Misc.2d 2, 4–5, 349 N.Y.S.2d 623, 625–26 (Fam.Ct.1973); *Gallagher v. Akoff Realty Corp.,* 197 Misc. 460, 461, 95 N.Y.S.2d 796, 797–98 (Sup.Ct.1950); *Myles E. Rieser Co. v. Loew's Inc.,* 194 Misc. 119, 120–21, 81 N.Y.S.2d 861, 862 (Sup.Ct.1948).

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